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6 UNITED STATES DISTRICT COURT
7 EASTERN DISTRICT OF WASHINGTON
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9 STEVEN WAYNE DICKINSON,

10 Plaintiff,

11 v.
12

13 CAROLYN W. COLVIN,
14 Commissioner of Social Security,

15 Defendant.
16

No. 1:15-CV-03167-JTR

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT

17 **BEFORE THE COURT** are cross-Motions for Summary Judgment. ECF
18 No. 15, 16. Attorney Dana C. Madsen represents Steven Wayne Dickinson
19 (Plaintiff); Special Assistant United States Attorney Leisa A. Wolf represents the
20 Commissioner of Social Security (Defendant). The parties have consented to
21 proceed before a magistrate judge. ECF No. 7. After reviewing the administrative
22 record and the briefs filed by the parties, the Court **GRANTS, in part,** Plaintiff's
23 Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary
24 Judgment; and **REMANDS** the matter to the Commissioner for additional
25 proceedings pursuant to 42 U.S.C. § 405(g).

26 **JURISDICTION**

27 Plaintiff filed an application for Disability Insurance Benefits (DIB) on
28 February 10, 2012, alleging disability as of January 23, 2011, due to a bipolar

1 disorder, hepatitis C, high blood pressure, and carpal tunnel syndrome. Tr. 179-
2 188, 212. The application was denied initially and upon reconsideration. Tr. 119-
3 121, 126-130. Both the Notice of Hearing and the ALJ's decision references an
4 application for Supplemental Security Income (SSI) being filed on April 8, 2013.
5 Tr. 18, 142. However, the record only contains an application for SSI filed on
6 February 12, 2012.¹ Tr. 189-194. Administrative Law Judge (ALJ) Donna L.
7 Walker held a hearing on August 13, 2014, at which Plaintiff,² medical expert,
8 Harvey Alpern, M.D., medical expert David Myers, Ph.D., and vocational expert,
9 Daniel McKinney, testified. Tr. 34-67. At the hearing, Plaintiff amended his onset
10 date to June 23, 2011. Tr. 40-41. The ALJ issued an unfavorable decision on
11 September 11, 2014, denying both the DIB and SSI applications. Tr. 18-29. The
12 Appeals Council denied review on August 14, 2015. Tr. 1-6. The ALJ's
13 September 11, 2014, decision became the final decision of the Commissioner,
14 which is appealable to the district court pursuant to 42 U.S.C. § 405(g). Plaintiff
15 filed this action for judicial review on September 22, 2015. ECF No. 1, 4.

16 **STATEMENT OF FACTS**

17 The facts of the case are set forth in the administrative hearing transcript, the
18 ALJ's decision, and the briefs of the parties. They are only briefly summarized
19 here.

20 Plaintiff was 56 years old at the date of onset. Tr. 181. Plaintiff reported
21 that he attended two years of college, completing the second year in 1976. Tr. 213.
22 He last worked in January 2011 and reported that he stopped working due to his
23 conditions, stating "[m]y boss fired me for being too negative, unpredictable, and
24

25 ¹Upon remand, the ALJ is instructed to determine which application for SSI
26 is being adjudicated and supplement the record with the April 8, 2013, application
27 if necessary.

28 ²Plaintiff was represented by counsel. Tr. 34-67.

1 unable to work well under pressure.” Tr. 212.

2 STANDARD OF REVIEW

3 The ALJ is responsible for determining credibility, resolving conflicts in
 4 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
 5 1039 (9th Cir. 1995). The Court reviews the ALJ’s determinations of law de novo,
 6 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
 7 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
 8 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
 9 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
 10 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
 11 another way, substantial evidence is such relevant evidence as a reasonable mind
 12 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
 13 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
 14 interpretation, the court may not substitute its judgment for that of the ALJ.
 15 *Tackett*, 180 F.3d at 1097. Nevertheless, a decision supported by substantial
 16 evidence will be set aside if the proper legal standards were not applied in
 17 weighing the evidence and making the decision. *Browner v. Secretary of Health*
 18 *and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If substantial evidence
 19 supports the administrative findings, or if conflicting evidence supports a finding
 20 of either disability or non-disability, the ALJ’s determination is conclusive.
 21 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9th Cir. 1987).

22 SEQUENTIAL EVALUATION PROCESS

23 The Commissioner has established a five-step sequential evaluation process
 24 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
 25 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one
 26 through four, the burden of proof rests upon the claimant to establish a *prima facie*
 27 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-1099. This
 28 burden is met once the claimant establishes that physical or mental impairments

1 prevent him from engaging in his previous occupations. 20 C.F.R. §§
2 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do his past relevant work,
3 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show
4 that (1) the claimant can make an adjustment to other work, and (2) specific jobs
5 exist in the national economy which the claimant can perform. *Batson v. Comm'r*
6 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194 (2004). If the claimant cannot
7 make an adjustment to other work in the national economy, a finding of “disabled”
8 is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

9 ADMINISTRATIVE DECISION

10 On September 11, 2014, the ALJ issued a decision finding Plaintiff was not
11 disabled as defined in the Social Security Act.

12 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
13 activity since June 23, 2011, the amended date of onset. Tr. 20.

14 At step two, the ALJ determined Plaintiff had the following severe
15 impairments: depression and anti-social personality disorder. Tr. 20.

16 At step three, the ALJ found Plaintiff did not have an impairment or
17 combination of impairments that met or medically equaled the severity of one of
18 the listed impairments. Tr. 21.

19 At step four, the ALJ assessed Plaintiff’s residual function capacity and
20 determined he could perform a full range of work at all exertional levels but with
21 the following nonexertional limitations: “he can perform simple, routine repetitive
22 tasks, away from the general public with the ability to work in proximity to, but not
23 in close cooperation with, others. Tr. 23. The ALJ identified Plaintiff’s past
24 relevant work as “folder glue operator” and “creasing and cutting press feeder” and
25 concluded that Plaintiff was able to perform the past relevant work of “creasing
26 and cutting press feeder.” Tr. 27-28.

27 In the alternative to a step four denial, the ALJ made a step five
28 determination that, considering Plaintiff’s age, education, work experience and

1 residual functional capacity, and based on the testimony of the vocational expert,
 2 there were other jobs that exist in significant numbers in the national economy
 3 Plaintiff could perform, including the jobs of small products assembler II and hand
 4 packager. Tr. 28-29. The ALJ thus concluded Plaintiff was not under a disability
 5 within the meaning of the Social Security Act at any time from June 23, 2011,³
 6 through the date of the ALJ's decision, September 11, 2014. Tr. 29.

7 **ISSUES**

8 The question presented is whether substantial evidence supports the ALJ's
 9 decision denying benefits and, if so, whether that decision is based on proper legal
 10 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the
 11 medical source statements in the record, and (2) failing to properly consider
 12 Plaintiff's credibility.

13 **DISCUSSION**

14 **A. Medical Opinions**

15 Plaintiff argues the ALJ failed to properly consider and weigh the medical
 16 opinions expressed by John Arnold, Ph.D., Sean Smitham, Ph.D., and David A.
 17 Myers, Ph.D. ECF No. 15 at 15-16.

18 In weighing medical source opinions, the ALJ should distinguish between
 19 three different types of physicians: (1) treating physicians, who actually treat the
 20 claimant; (2) examining physicians, who examine but do not treat the claimant;

21
 22 ³The ALJ's decision states "[t]he claimant has not been under a disability, as
 23 defined in the Social Security Act, from January 23, 2011, through the date of this
 24 decision." Tr. 29. It appears that the ALJ's reference to January 23, 2011, is a
 25 scrivener's error as the ALJ references Plaintiff's alleged date of onset being
 26 amended to June 23, 2011, elsewhere in the decision and the hearing transcript
 27 shows the ALJ and Plaintiff's counsel discussed June 23, 2011, as the amended
 28 date of onset. Tr. 20, 40-41.

1 and, (3) nonexamining physicians who neither treat nor examine the claimant.
2 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
3 weight to the opinion of a treating physician than to the opinion of an examining
4 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). The ALJ should give
5 more weight to the opinion of an examining physician than to the opinion of a
6 nonexamining physician. *Id.*

7 When a treating physician's opinion is not contradicted by another
8 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
9 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
10 physician's opinion is contradicted by another physician, the ALJ is only required
11 to provide "specific and legitimate reasons" for rejecting the opinion of the first
12 physician. *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when
13 an examining physician's opinion is not contradicted by another physician, the
14 ALJ may reject the opinion only for "clear and convincing" reasons. *Lester*, 81
15 F.2d at 830. When an examining physician's opinion is contradicted by another
16 physician, the ALJ is only required to provide "specific and legitimate reasons" for
17 rejecting the opinion of the examining physician. *Id.* at 830-831.

18 The specific and legitimate standard can be met by the ALJ setting out a
19 detailed and thorough summary of the facts and conflicting clinical evidence,
20 stating his interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
21 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer his
22 conclusions, he "must set forth his interpretations and explain why they, rather
23 than the doctors', are correct." *Embrey v. Bowen*, 849 F.2d 418, 421-422 (9th Cir.
24 1988).

25 **1. John Arnold, Ph.D.**

26 On March 15, 2013, Dr. Arnold completed an evaluation of Plaintiff for the
27 Washington Department of Social and Health Services (DSHS). Tr. 618-624. Dr.
28 Arnold diagnosed Plaintiff with bipolar I disorder and antisocial personality

1 disorder with paranoid features. Tr. 619. He opined that Plaintiff had a moderate⁴
2 limitation in the following abilities: (1) understand, remember, and persist in tasks
3 by following very short and simple instructions, (2) perform activities within a
4 schedule, maintain regular attendance, and be punctual within customary
5 tolerances without special supervision, (3) perform routine tasks without special
6 supervision, (4) adapt to changes in a routine work setting, (5) be aware of normal
7 hazards and take appropriate precautions, (6) ask simple questions or request
8 assistance, (7) communicate and perform effectively in a work setting, (8)
9 complete a normal work day and work week without interruptions from
10 psychologically based symptoms, (9) maintain appropriate behavior in a work
11 setting, and (10) set realistic goals and plan independently. Tr. 620.

12 At the hearing, Plaintiff's counsel proposed a hypothetical to the vocational
13 expert in which an individual had a moderate limitation in the above ten abilities
14 with moderate being defined as it was on the DSHS form. Tr. 65-67. The
15 vocational expert stated that "[a] person with that profile and that definition of
16 moderate would not be able to maintain any form of competitive employment and
17 would have only access to sheltered work at best." Tr. 66-67.

18 The ALJ gave Dr. Arnold's opinion "significant weight" because he had the
19 opportunity to meet with and to examine Plaintiff, his opinion was based on
20 firsthand observations, and the opinion was consistent with the opinions of Dr.
21 Smitham and with Dr. Myers. Tr. 26.

22 Despite giving Dr. Arnold's testimony "significant weight" and the
23 vocational expert testifying that a person with the profile opined by Dr. Arnold
24 would be unable to perform competitive work, the ALJ gave Plaintiff a residual
25 functional capacity with limitations only in the abilities to perform simple tasks
26

27 ⁴“Moderate” means there are significant limits on the ability to perform on
28 or more basic work activity.” Tr. 620.

1 and interact with the general public and with others. Tr. 23. Essentially, by failing
 2 to find any limitations in the ability to perform tasks without special supervision,
 3 adapt to changes in the work setting, be aware of hazards, ask simple questions,
 4 communicate and perform effectively, complete a normal work day and work
 5 week, and set realistic goals, the ALJ rejected Dr. Arnold's opinion. Here, the ALJ
 6 failed to provide any reason why Dr. Arnold's opinion, even a portion of it, was
 7 rejected. Therefore, the ALJ erred in her treatment of Dr. Arnold's opinion.

8 **2. Sean Smitham, Ph.D.**

9 On August 17, 2012, Dr. Smitham completed a consultative examination, in
 10 which he diagnosed Plaintiff with bipolar disorder and antisocial personality
 11 disorder. Tr. 524. Dr. Smitham opined that Plaintiff had (1) no limitation in the
 12 ability to understand, remember, and follow simple (one or two step) instructions,
 13 (2) a mild to marked limitation in the ability to understand, remember, and follow
 14 complex (multistep) instructions, (3) a none to moderate limitation in the ability to
 15 learn to tasks, depending on the task, (4) a mild to marked limitation in the ability
 16 to exercise judgment and make decisions, (5) no limitation in the ability to perform
 17 routine tasks, (6) a mild to marked limitation in the ability to relate appropriately to
 18 co-workers and supervisors, (7) a mild to marked limitation in the ability to
 19 interact appropriately in public contexts, (8) a mild to marked limitation in the
 20 ability to respond appropriately to and tolerate the pressures and expectations of a
 21 normal work environment, and (9) a mild to marked limitation in the ability to
 22 maintain appropriate behavior in a work setting.⁵ Tr. 524-525. Additionally, Dr.
 23 Smitham stated the following:

24 Despite the mental impairments noted above, the patient still has the
 25 ability to reason, understand and remember. Psychological factors may
 26 interfere with the patient's ability to sustain concentration and persist
 27 with tasks. Psychological factors may also interfere with social
 28 interactions and the patient's ability to flexibly adapt to changes in a
 work setting. However, the patient is capable of improving in these

⁵The terms mild, moderate, and marked were undefined. Tr. 524-525.

1 areas via learning or strengthening coping skills.

2 Tr. 525.

3 The ALJ gave Dr. Smitham's opinion "significant weight" because he had
4 the opportunity to meet and examine Plaintiff, his opinion was based on firsthand
5 observations, and the opinion was consistent with the opinions of Dr. Arnold and
6 Dr. Myers. Tr. 26.

7 Again, despite giving Dr. Smitham's testimony "significant weight," the
8 ALJ gave Plaintiff a residual functional capacity including only limitations in the
9 abilities to perform simple tasks and interact with the general public and with
10 others. Tr. 23. By failing to find any limitations in the ability to learn new tasks,
11 exercise judgement, respond appropriately to and tolerate the pressures and
12 expectations of a normal work environment, and maintain appropriate behavior,
13 the ALJ rejected Dr. Smitham's opinion. Again, the ALJ failed to provide any
14 reasons why Dr. Smitham's opinion, even a portion of it, was rejected. Therefore,
15 the ALJ erred in her treatment of Dr. Smitham's opinion.

16 **3. David A. Myers, Ph.D.**

17 Dr. Myers testified at the August 13, 2014, hearing. Tr. 44-53. He stated
18 that the diagnosis of bipolar disorder was questionable, and he did not "see the
19 evidence in the record of any change from when he - - change in his psychological
20 condition from when he could work to now." Tr. 49-50. Dr. Myers stated that
21 Plaintiff could perform eight hours a day, five days a week on a sustained basis in a
22 competitive environment. Tr. 51. Dr. Myers did not give a narrative residual
23 functional capacity opinion. Tr. 44-53.

24 The ALJ gave Dr. Myers' opinion "significant weight" because he was
25 familiar with Social Security regulations and rulings, his opinion was based on a
26 complete review of the medical records, and it was consistent with the findings and
27 opinions of Dr. Smitham and Dr. Arnold. Tr. 26.

28 The ALJ repeatedly held that the opinions of Dr. Myers, Dr. Smitham, and

1 Dr. Arnold were consistent. Tr. 26. However, a review of these three opinions
2 show they are anything but consistent. On two opposite ends, Dr. Myers opined
3 Plaintiff could return to his past work and Dr. Arnold's opinion resulted in no jobs
4 when presented in a hypothetical to the vocational expert. Finally, Dr. Smitham's
5 opinion appears to fall somewhere between these two extremes. Considering the
6 ALJ based her residual functional capacity determination on the premise that these
7 three opinions were consistent, the ALJ erred in her treatment of all three of the
8 medical opinions.

9 Due to the ALJ's errors in the treatment of Dr. Arnold's, Dr. Smitham's, and
10 Dr. Myers' opinions, the case is to be remanded for additional proceedings, in
11 which the ALJ is instructed to readdress the medical opinions in the record, resolve
12 any inconsistencies in the opinions and provide legally sufficient reasons for why
13 any opinion, or any portion of any opinion, is not incorporated into the residual
14 functional capacity determination. Furthermore, the ALJ is instructed to review
15 Dr. Smitham's opinion in light of 20 C.F.R. §§ 404.1519o(b), 416.919o(b), since it
16 appears the consultative examination report does not have a signature as specified
17 under 20 C.F.R. §§ 404.1519n(e), 416.919n(e) and POMS DI 22510.015C.

18 **B. Credibility**

19 Plaintiff contests the ALJ's adverse credibility determination in this case.
20 ECF No. 15 at 11-14.

21 It is generally the province of the ALJ to make credibility determinations,
22 *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific
23 cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent
24 affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's
25 testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d
26 1273, 1281 (9th Cir. 1996); *Lester*, 81 F.3d at 834. "General findings are
27 insufficient: rather the ALJ must identify what testimony is not credible and what
28 evidence undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

1 The ALJ found Plaintiff less than fully credible concerning the intensity,
2 persistence, and limiting effects of his symptoms. Tr. 23, 25. The ALJ compared
3 Plaintiff's statements regarding his limitations as noted by medical personnel,
4 together with his similar statements at the hearing, to medical records describing
5 his mental status and improvement with treatment. Tr. 23-26. While it may be that
6 Plaintiff's statements were not consistent with these medical records, this
7 comparison cannot alone support an adverse credibility finding. *See Rollins v.*
8 *Massanari*, 261 F.3d 853, 857 (9th Cir. 2001) (while objective medical evidence is
9 a "relevant factor in determining" the severity of the claimant's symptoms and
10 their disabling effects, it cannot serve as the sole ground for rejecting a claimant's
11 credibility).

12 Inconsistencies with the medical evidence was the sole reason the ALJ
13 rejected Plaintiff's credibility. This alone is not sufficient to support an adverse
14 credibility determination. Therefore, the ALJ is instructed to readdress Plaintiff's
15 credibility on remand.

16 REMEDY

17 The decision whether to remand for further proceedings or reverse and
18 award benefits is within the discretion of the district court. *McAllister v. Sullivan*,
19 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate
20 where "no useful purpose would be served by further administrative proceedings,
21 or where the record has been thoroughly developed," *Varney v. Secretary of Health*
22 *& Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused
23 by remand would be "unduly burdensome," *Terry v. Sullivan*, 903 F.2d 1273, 1280
24 (9th Cir. 1990). *See also Garrison v. Colvin*, 759 F.3d 995, 1021 (9th Cir. 2014)
25 (noting that a district court may abuse its discretion not to remand for benefits
26 when all of these conditions are met). This policy is based on the "need to
27 expedite disability claims." *Varney*, 859 F.2d at 1401. But where there are
28 outstanding issues that must be resolved before a determination can be made, and it

1 is not clear from the record that the ALJ would be required to find a claimant
2 disabled if all the evidence were properly evaluated, remand is appropriate. *See*
3 *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211
4 F.3d 1172, 1179-80 (9th Cir. 2000).

5 In this case, it is not clear from the record that the ALJ would be required to
6 find Plaintiff disabled if all the evidence were properly evaluated. Further
7 proceedings are necessary for the ALJ to properly consider and weigh the medical
8 opinions in the record and to determine Plaintiff's credibility regarding his
9 symptom reporting. The ALJ is further instructed to supplement the record with
10 any outstanding medical evidence and elicit testimony from a vocational expert if a
11 step four and step five determination is necessary.

12 CONCLUSION

13 Accordingly, **IT IS ORDERED:**

14 1. Defendant's Motion for Summary Judgment, **ECF No. 16**, is
15 **DENIED**.

16 2. Plaintiff's Motion for Summary Judgment, **ECF No. 15**, is
17 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
18 additional proceedings consistent with this Order.

19 3. Application for attorney fees may be filed by separate motion.

20 The District Court Executive is directed to file this Order and provide a copy
21 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
22 **and the file shall be CLOSED**.

23 DATED July 19, 2016.



A handwritten signature in black ink, appearing to read "M", is written over a horizontal line.

JOHN T. RODGERS
UNITED STATES MAGISTRATE JUDGE